United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-2114

UNITED STATES COURT OF APPEALS
For the Second Circuit

- -x

REGINALD ROBERTSON, :

Appellant, : No. 76-2114

-against- :

PAUL J. REGAN, Chairman, New York State Board of Parole, :

Appellee. :

- -x

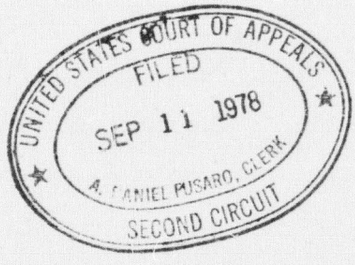
9/11

B

P/S

On Appeal from the United States District Court
for the Southern District of New York

BRIEF AND APPENDIX OF THE APPELLANT



W. A. Newcomb
ATTORNEY AT LAW
36 W 44 St
NEW YORK, N. Y. 10036
840 1845

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
For the Second Circuit

- -x

REGINALD ROBERTSON, :

Appellant, : No. 76-2114

-against- :

PAUL J. REGAN, Chairman, New York State Board of Parole, :

Appellee. :

- -x

BRIEF AND APPENDIX OF THE APPELLANT

PRELIMINARY STATEMENT

Reginald Robertson appeals from the decision of the Hon. Whitman Knapp, District Judge of the Southern District of New York, dismissing his complaint which he brought as a prisoner against Paul J. Regan, Chairman of the New York State Board of Parole, which decision was filed on April 22, 1976. (R. 10.) Judge Knapp granted said appellant leave to proceed in forma pauperis on October 19, 1976. (R. 13.) This Court granted a motion to the same effect on February 15, 1977 and counsel was appointed under the Criminal Justice Act by order of this Court on or about June 30, 1978, although counsel's copy of the same is undated. The issue is whether or not the New York State Board of Parole may have caused him cognizable harm in not treating the question of his parole at that time at which his eligibility accrued by statute.

INDEX

STATUTES CITED

CASES CITED

STATEMENT OF FACTS AND PROCEEDINGS

As the facts and proceedings of this case are so intertwined, it would be impossible to extricate one from the other and they are consequently treated upon such a basis. Appellant's complaint (R. 1) seeks damages of $100,000.00 and is based upon certain Constitutional grounds, viz., asserted violations of the clauses concerning due process and the prohibition of cruel and unusual punishment. It also alleges irreparable injuries, a conspiracy to cause him to suffer, and a reckless endangerment of his life in that he has continued to be wrongfully imprisoned without any adequate or sufficient remedy. However extravagant all of that may or may not sound, it should not obscure the possibility of there being actual substance to a claim in which the allegation of continued wrongful imprisonment is grounded upon, in the words of the Court below, "the Board's admitted failure to consider him for parole when he first became eligible ***." (R. 10, p. 1.) The sole question treated in this brief is whether or not appellant has a claim based upon the facts of this case. Upon the state of the record, the deficiencies of which in some measure are to be expected when a prisoner of little evident education must act pro se, it would be impossible to treat any question of damages or, indeed, whether or not appellant might have had different or additional remedies.

Appellant's complaint filed in the Court below on February 11, 1975 runs for nine pages, much of it devoted to the quoting of statutes from the Penal and Corrections Laws and a related discussion of the policy behind the parole procedure. (See R. 1.) Whether it may be said to ramble or not, appellant's complaint, as its greatest deficiency, fails to allege all of the facts which gave rise to the "admitted failure to consider him for parole," which omission consists of a neglect to set forth the matter of his 1961 conviction and sentence. It was that matter, however, which should have been treated in conjunction with his 1972 conviction and sentence, matter which he did set forth in his complaint (R. 1, p. 4), the two such convictions with their sentencing to concurrent terms having been responsible for producing what the Court below termed the "Board's lapses in computation" in calculating appellant's parole eligibility. (See R. 10, pp. 1-3.) As already noted, it was that lapse or failure which forms the gravamen of appellant's complaint.

Had appellant had the assistance of counsel to draft his complaint, it might well have happened that these matters would have been alleged with sufficient clarity concerning a most confusing subject which would have been of assistance to both parties as well as the Court from that point on. However, such an initial failure of clarity produced (perhaps inevitably so) a confusion which was to inhere in this case throughout its course. Concerning

the question of parole eligibility as it affected appellant, the Court below found that 'the necessary calculations in this case are quite confusing." (R. 10, pp. 1-2.) There can be no disputing that statement. The gist of the matter is that whereas all of appellant's sentences, old and new, were to be served concurrently, the credit for the time he had served under his first or 1961 conviction was also to be applied to the determination of his parole eligibility under his second or 1972 conviction.

On the ground that the defendant required certain information it had not yet received from the New York State Board of Parole in order to answer appellant's complaint, its time to answer or move against it was extended to April 15, 1975 by Judge Knapp on April 1st. (R. 4.) Although the Notice of Motion as such has not been included in the record certified to this Court (for whatever reason unknown to counsel), it is nevertheless apparent that defendant did move to dismiss the complaint on the ground that it was moot. (See R. 5, deft's memorandum of law, dated April 1, 1975.) Defendant's memorandum does state that appellant had been sentenced to a minimum of fifteen and a maximum of thirty years' imprisonment on April 25, 1961 for robbery, grand larceny and assault, all in the second degree. These sentences were to be served concurrently. (R. 5, p. 2.)

Appellant served a reply affidavit to the memorandum,

dated April 15, 1962, which was filed the following day. (R. 6.) In it for the first time, he adverted to his 1961 conviction, which he should have done from the beginning to help his own cause. (R. 6, p. 2.) It was appellant's contention, however, that at the hearing held by the Parole Board on January 29, 1975 at which he was supposed to be considered for release, no mention was made of his earlier 1961 conviction because that would have determined his eligibility for release to have been September 19, 1972 under his second or 1972 conviction, had his two convictions been treated together as they should have been. He also contended that a reading of the transcript taken at that hearing would have shown that to be the reason for such silence, viz., that the Board refused to admit in 1975 that he was so eligible in 1972. It is his further contention that at the hearing of January 29th, in reaffirming his parole eligibility to be in August, 1975, the Board acted fraudulently. (See R. 6, p. 2.)

This was a most serious charge to make and it went to the heart of the proceedings before the Board. Again, it raised the issue to be decided by the Court below whether or not the Board treated its own "admitted failure" properly or, indeed, whether or not it was possible for it to do so. Nor can such a serious charge easily be termed frivolous when such a substantial mistake was made concerning the question of appellant's parole eligibility. Certainly, the defendant did not treat it as frivolous. It with-

drew its motion to dismiss so that the August hearing upon appellant's eligibility could be held. (R. 10, p. 3.) Specifically, the date of the hearing was August 26, 1975. (See R. 8, Ex. A, p. 5.) As the Court below noted, the Board denied parole to appellant at that hearing and decided to hold him for two more years. (R. 10, p. 3.) Although there may be no right to parole as such, the question nevertheless does arise whether or not the Board's admitted failure in not treating appellant's eligibility when he was first entitled to have it considered could or did affect its later decision denying him parole.

It should be noted further that although the transcript of that August hearing is a part of the record before this Court (see R. 8, Ex. A), the transcript of the January hearing is not. Therefore, it is impossible to determine upon the present record whether or not there is any substance to appellant's allegation that the Board made no mention of his 1961 convictions in order to conceal the fact of the earlier date for his parole eligibility to which he was entitled. Concerning that January hearing, the Court below said:

> "*** Notice of the hearing was apparently the first time plaintiff became aware of his statutory right to an eligibility hearing, and he filed this action on January 11, 1975. ***." (R. 10, p. 3.)

The Court noted correctly that the hearing date was January 29, 1975 (R. 10, p. 3; see also R. 5, p. 5) but the Court was not

correct in stating that "he filed this action on January 11, 1975." The clerk's stamp shows that it was filed at 2:17 P.M. on February 11, 1975. (R. 1, p. 1.) Therefore, it is clear that appellant commenced his action after that hearing of January 29th had been held, a fact that makes the absence of its transcript from the present record all the more regrettable. The transcript of the August hearing does show that appellant raised the question of his eligibility credits himself, not the Board. (See R. 8, Ex. A, pp. 4-5.) And that discussion begins near the bottom of page 4 with the question: "Is there anything else?"

Referring to that discussion, counsel interprets the block letters "MPI" to mean "minimum parole indication." And mention is made of a "three year MPI" in that discussion. It will be observed that the Court below referred to exactly the same thing as a sentence. The following is an illustration.

> "*** on July 18, 1973, the Board held a hearing and set the plaintiff's minimum sentence at three years from the date of his reception at the correctional facility. ***." (R. 10, p. 2.)

Obviously, an MPI is not a sentence, unless it can be said that it is a sentence within a sentence, and it could well be that the Court below used that word for want of any better description.

The Court's opinion lists three hearings as having been held. The first such hearing is mentioned in the language already quoted, that of July 18, 1973. As the Court noted, that hearing

was held after appellant's commitment to a correctional facility on September 19, 1972, which followed his 1972 conviction for first degree manslaughter. (R. 10, p. 2.) This was the hearing at which the error of miscalculating his MPI or parole eligibility was made, the one which the Court noted, also in the language quoted immediately above, amounted to "three years from the date of his reception at the correctional facility." It was at that point, however, that counsel for the Department of Correctional Services informed the Board that appellant was already entitled to parole because of the fact that all of his sentences, old and new, ran concurrently. (R. 10, p. 2.)

It was with this background that the second hearing of January 29, 1975 was held, the one concerning which appellant has made his charge of fraudulent procedure. Whether or not he became aware of his right to a parole eligibility hearing when he received notice of that hearing, a matter which would seem to be irrelevant, it was after that hearing that he brought suit in the Southern District. And it was with this additional background of his action having been commenced that the third hearing of the Parole Board was held on August 26, 1975, the defendant's motion to dismiss appellant's complaint having been withdrawn in the meantime.

Defendant brought its renewed motion to dismiss appellant's complaint by its notice, dated November 18, 1975, on the ground

that it failed to state a claim upon which relief could be granted. (R. 7.) That motion was granted; hence the present appeal. Concerning the Court's decision dismissing that appeal, Judge Knapp, even with that good will with which he expressed his sympathy for appellant's frustration (R. 10, pp. 4-5), cannot be said to have escaped entirely that confusion to which he himself alluded. And that confusion is shown by the following language, which represents an impossibility.

> "*** On December 21, 1971, plaintiff was paroled. He was subsequently arrested on August 20, 1971, and charged with first degree murder. On the basis of this arrest, he was declared delinquent on October 21, 1971. ***." (R. 10. p. 2.)

That quoted language is an adaptation of much the same language to be found in defendant's second memorandum of law submitted in support of its second motion to dismiss appellant's complaint, which again represents an impossibility.

> "*** On December 21, 1971, plaintiff was paroled from Clinton Correctional Facility. Subsequently, plaintiff was arrested on August 20, 1971, for the crime of murder in the first degree. Due to the arrest, he was declared delinquent on October 21, 1971. ***." (R. 8, p. 2.)

Reading these passages side by side, it is fascinating to observe that although the Court saw fit to amend and adapt the language of the brief when it incorporated it into its decision, it did not correct what had to be an obvious mistake. And that mistake is also to be found in the very same language in defendant's

first memorandum of law submitted in support of its first motion to dismiss (see R. 5, p. 2), the motion which was withdrawn. It was a hardy mistake for it survived two briefs and found its way into the Court's decision.

The fact is of course that appellant was paroled in 1970, not 1971, albeit the day, December 21st, was noted correctly. For that fact, we have appellant's own statement and under the circumstances, it may surely be relied upon. (See R. 13, Motion to Proceed in Forma Pauperis, Statement of Facts, 1st ¶, 3rd page.) These quoted passages do more than show that state of confusion which has attended this case from start to finish. This repeated and adopted mistake also shows that this case could not have received the consideration it should have. And that lack of proper treatment was more likely to ensue for appellant's not having the help of counsel when he most needed it, that is, right at the start of his action. It was at that point above all others that appellant required professional assistance in presenting his allegations to the Court so that the merits of his claim would not be buried under that avalanche of verbiage to which he has shown himself addicted, much to his own detriment.

In sorting out the case as he did, Judge Knapp cannot fairly be criticized, even for the mistakes to which counsel owes it to appellant to call to the Court's attention. For it represents the

failure not of any particular judge but rather that failing which must inhere in any adversary proceeding in which the Court must in effect serve two incompatible functions. In some degree at least, a district judge must don two ill fitting hats when by default of a party's having an attorney, he must decide what such an attorney would have decided in order for him to decide the case as a judge. Not only must it constitute unavoidable guesswork but in attempting the former task, he can hardly disregard the latter. And as one constricts the other, the risk to be run is that of compounding whatever confusion there was in the case to begin with. In the present case, there was such initial confusion, that confusion to which Judge Knapp himself so candidly adverted. Nor was it his only instance of such candor. As one deficiency in the record which he himself noted, he stated that it did "not indicate whether a parole hearing was held." (R. 10, p. 2.)

The entire state of confusion in this case, born of the miscalculation of appellant's parole eligibility and carried forward in the proceedings of the Parole Board, not to mention the other deficiencies in the record now before this Court, cannot be eradicated for the purposes of this appeal. It can only be passed over, which would be to pronounce a cure when there has been no cure. But if that state of confusion is to be dealt with properly, then the issue which nevertheless emerges from the record must be recognized, viz., that appellant has a claim based upon a failure of

procedural due process before the Parole Board for which there can be no presumption that he has not suffered harm. The difficulty is that that issue cannot be decided upon a record which is missing certain papers and also has a paucity of facts, a paucity which resulted from nothing more heinous than allowing an uncorrected error to run its course through a set of proceedings as if nothing could be done about it.

DISCUSSION

UNDER THE REQUIREMENTS OF PROCEDURAL DUE PROCESS AS THEY APPLY TO THE PARTICULAR CIRCUMSTANCES OF THIS CASE, IT SHOULD BE REMANDED SO THAT APPELLANT MAY HAVE THE ASSISTANCE OF COUNSEL AT THAT LEVEL AT WHICH IT MAY DO HIM THE MOST GOOD.

In its decision, the Court below cited only one case, viz., U.S. ex rel. Johnson v. Chairman of N.Y. State Board of Parole, 500 F.2d 925 (2d Cir. 1974). Specifically, Judge Knapp held that the Board's denial of parole to appellant was "within the very broad discretion granted to the Board by statute" (R. 10, p. 3) for which he referred to the discussion of the Board's powers on page 929 of the Johnson case. And it must be said that in conformity with the holding in Johnson, the Board did give a written statement of its reasons in denying parole to appelant. (R. 8, Ex. B.) The question remains whether or not under the peculiar circumstances of

this case, that represented the minimum standard of fairness required for review purposes under procedural due process because there is one issue respecting appellant's proceedings before the Board as to which that written statement is by no means addressed.

In Johnson, this Court declined to overrule its decision in Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), cert. denied 400 U.S. 1023, in which it was held that prisoners of the State of New York were not entitled to a parole release hearing as a matter of procedural due process. Subsequently, the decision of the Supreme Court in Morrisey v. Brewer, 408 U.S. 471 (1972), held that in parole revocation proceedings, the parole board must grant a hearing as a minimum requirement of due process. Therefore, in Johnson, this Court decided that whether the matter was one of parole release or parole revocation, Morrisey had effectively done away with the distinction.

> "*** Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration." 500 F. 2d at p. 928.

If such an identity of the stake at issue in both cases demands the same procedure, the next question is: what kind of hearing must the prisoner receive? As to the present case with its odd circumstance of the prisoner's parole eligibility arising virtually upon his incarceration, did he receive the hearing that under all aspects of the case he fairly should have? Judge Knapp

held that he did or that at least its result was proper. But it is fair to note that that written statement furnished by the Board after the August hearing (R. 8, Ex. B) does not even touch upon the issue of why appellant never received an eligibility hearing when it was first due him.

There is, moreover, another question which arises about this case which nobody can answer upon the present record. That is true of all of the federal judges who must concern themselves with this case as well as counsel. Again, the record fails to furnish any desired enlightenment. Appellant was out of prison on parole when he was arrested for the crime of murder. His resulting conviction in 1972 was for the lesser crime of manslaughter in the first degree (R. 10, p. 2), which on the face of it was still worse than any of the three crimes for which he was convicted in 1961. According to the defendant's memorandum of law, appellant was sentenced by the same judge in 1972 as in 1961, Justice Starkey of the Supreme Court of Kings County. (R. 5, p. 2.) Yet that same sentencing judge in imposing appellant's sentence for manslaughter, made it to run concurrently with his 1961 sentences. Under the presumption of regularity that attends all judicial proceedings, that matter of concurrent sentencing cannot be deemed to have resulted from the judge's possible ignorance of its parole eligibility consequences.

The sentencing judge, Justice Starkey, had a wide discretion available to him in punishing appellant for the 1972 crime for which he was convicted. Manslaughter in the first degree is a Class B felony. Penal Law § 125.50. The indeterminate sentence to be given a defendant who has committed a Class B felony "shall not exceed twenty-five years." Penal Law § 70.00(2)(b). Under Penal Law § 70.00(3)(b), the sentencing judge also has it within his discretion to impose a minimum sentence. For all that appears, he did not do so. At least, the defendant's memorandum makes no mention of it and appellant in his motion papers to proceed in forma pauperis, indicates that the Court did not give him a minimum sentence. He does so in referring to his sentence as "an indeterminate term of 0-20 years." (See R. 13, Statement of Facts, 3rd ¶, 3rd page.) Now it cannot be said that the sentencing judge did not have his reasons for so doing. However, under the statute, he was only required to state his reasons for the record in the event that he imposed a minimum sentence. See Penal Law § 70.00(3)(b). Had Justice Starkey imposed such a minimum sentence, it is manifest that appellant's parole eligibility date would never have fallen when it did, whether or not the Board suffered its "lapses in computation" as to the actual date. Moreover, Justice Starkey had the clear discretion to impose appellant's 1972 sentence either concurrently or consecutively as to his 1961 sentences.

> "*** when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term

> of imprisonment, the sentence or sentences imposed by the court shall run either concurrently or consecutively with respect to each other and the undischarged term or terms in such manner as the court directs at the time of sentence. ***." Penal Law § 70.25.

Unquestionably, Justice Starkey had his reasons for imposing his 1972 sentence upon appellant as he did. Yet this Court, like Judge Knapp, has no idea of what they were. However, when it resulted in the peculiar parole eligibility date for the appellant that it did, it was incumbent upon the Board to address itself to those reasons. But it did not do so. There is not a word as to that in its written statement denying parole to appellant. (See R. 8, Ex. B.) And this impinges directly upon the language of the Johnson case.

> "*** a statement of reasons will permit the reviewing court to determine whether the Board has adopted and followed criteria that are appropriate, rational and consistent, and also protects the inmate against arbitrary and capricious decisions based upon impermissible considerations." 500 F.2d at p. 929.

In that hearing of August 26, 1975, appellant maintained his innocence concerning his 1972 conviction whereas he admitted his guilt concerning his 1961 convictions. (See R. 8, Ex. A, pp. 1 & 3.) Of course, that did not bind the Board but it is sufficient to suggest that Justice Starkey may have had some such doubt in mind even after the jury verdict (R. 8, Ex. A, p. 1) to have sentenced appellant in the manner he did, thereby making him

eligible for parole almost immediately at the same time that he gave him a long indeterminate sentence. At the least, it might have aroused the curiosity of the Board. But on the present record, there is no evidence whatever that the Board gave the slightest consideration to any possible purpose behind the manner of Justice Starkey's imposition of sentence. And it is only proper to say that it was all the more incumbent upon the Board to give appellant's case that consideration when it belatedly discovered that he was already eligible for parole. Indisputably, as a part of its task, the Board could have consulted the judge, especially when he had a prior acquaintance with the prisoner. Under the quoted criteria of the Johnson case, that matter and the matter of its own mistake should have been set forth in its written statement denying parole to appellant. As things stand, even though the Board's reasons might appear perfectly justified in an ordinary case, the Board's written statement, silent as it is upon these subjects, is no proof that an arbitrary and capricious decision has not been made.

These questions could have been raised more pointedly and with more assurance of doing justice in the Court below. The greatest failing of the present record, therefore, is that appellant quite obviously had no idea of how to establish his record even in those matters that could have been favorable to him. As a realistic matter, he required the assistance of coun-

sel in that court in which it could have made the difference. In the district court, an attorney could have investigated matters with a view to establishing a proper record for appellant's case. As Section 1983 of Title 42 permits "an action at law, suit in equity, or other proper proceeding for redress," an attorney could have applied for leave to amend that veritable mess denominated as appellant's complaint so that it would at least have been drafted in accord with the realities of the case, instead of its serving as a vent for understandable anger, a complaint which nevertheless was virtually bound to draw the result it did. Above all, counsel for appellant in the Court below could have assisted the judge to determine with some authority whether or not appellant did suffer any violation of his asserted rights in the proceedings before the Board.

It cannot be expected that a district judge can investigate matters in such a case for himself. First of all, it is not his function and, secondly, on the state of the record as it may be presented to him, he may find no indication whatsoever that there is any need further to investigate the facts. That is the job of the attorney, one that is best fulfilled by him in the very nature of our system. And in the case now before this Court, there were these various matters that could and should have been investigated by an attorney.

No matter how much time he may have spent in the prison law library, the obvious fact remains that appellant is illiterate in legal matters. He could not be expected to know that the record to be presented in the district court, without the help of counsel to remedy the matter, would have the substantive deficiency of any treatment by the Board of the issue of whether or not Justice Starkey's peculiar sentencing of appellant in 1972 of itself comported with the application of the statutory tests of Section 213 of the Corrections Law which govern the question of parole release. And further as the result of appellant's not having counsel when he most needed it, there is the substantive deficiency of Judge Knapp's decision itself of any specific determination of whether or not the Board was attending to its own interest by reducing or obviating the effect of its own mistake in reaching the result it did. And that is a very different question from simply holding that the Board had sufficient support from the record to decide as it did.

Whatever appellant's right to act pro se, there can be no warrant in fact for saying that he had the qualifications to do so. "As must generally be the case, the trial judge could not effectively discharge the roles of both judge and defense counsel." Carnley v. Cochran, 369 U.S. 506, 510 (1969). And as a practical matter, that left appellant to his inadequate devices when "representation in the role of an advocate [was] required." Ellis v.

United States, 356 U.S. 674, 675 (1958). The catch in the situation is a subtle one. If a plaintiff so situated as appellant has no attorney to begin with, he may have difficulty demonstrating his need for one. That the present case was unusual, to say the least, the Court below had no difficulty in recognizing. And that in itself should have been the warning bell. Yet this Court has spoken on this very point before.

> "*** There is a strong public policy, most strikingly illustrated by the Criminal Justice Act, 18 U.S.C. § 3006A, that an accused should be represented by counsel at all times, unless he has knowingly decided that he does not wish counsel. The district courts invite troublesome claims and questions whenever counsel is prematurely relieved or a hiatus is permitted. It matters not that the defendant is in jail serving a sentence." United States v. McIntyre, 396 F.2d 859, 861 (2d Cir. 1968), cert. denied 39 U.S. 1054.

Any distinction between the present case and the McIntyre case is superficial at most, one that should be relegated to the dust bin as was the case in Johnson. The paramount issue is that of freedom versus imprisonment and what difference counsel can make to a man facing that alternative. And for that matter in this concern for justice, the district court itself required counsel's assistance in this case in getting to the root of the matter, in finding out what this odd and strange case was all about. In the posture of things as they were left to themselves, that could not happen in the proceedings in the Court below, whatever the evident good will of the district judge, whatever

the high sense of justice he may be assumed to have. For all these reasons, appellant should have his day in court with the assistance of counsel.

CONCLUSION

The decision of the Court below should be reversed and the case remanded to the district court with directions to appoint counsel for appellant so that his action may be commenced de novo with that assistance of counsel he requires.

Respectfully submitted,

W. A. NEWCOMB
Attorney for Appellant
Reginald Robertson

Dated: September 11, 1978
New York, New York

APPENDIX

#c 4782

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

REGINALD ROBERTSON,

Plaintiff,

- against -

PAUL J. REGAN, Chairman, New York State Board of Parole,

Defendant.

- -x

MEMORANDUM AND ORDER

75 Civ. 677

KNAPP, D.J.

Reginald Robertson has brought this §1983 action pro se against the New York State Board of Parole. He has asked for money damages on the grounds that the Board's admitted failure to consider him for parole when he first became eligible denied him due process of law, subjected him to cruel and unusual punishment, and otherwise caused him injury. The Board in response has moved to dismiss this action pursuant to Federal Rule 12(b)(6) and (1) on the ground that the parole eligibility hearing it gave the plaintiff at a latter date, in which parole was denied, has made the issue moot.

The Board's lapses in computation, however unfortunate, are not difficult to understand, since the necessary calculations

10

in this case are quite confusing. Originally the plaintiff was sentenced on April 25, 1961, in the Supreme Court of Kings County, New York, to fifteen to thirty years for second degree robbery, second degree grand larceny and second degree assault, and five to twenty years for third degree robbery, all sentences to run concurrently. On December 21, 1971, plaintiff was paroled. He was subsequently arrested on August 20, 1971, and charged with first degree murder. On the basis of this arrest, he was declared delinquent on October 21, 1971. The record does not indicate whether a parole revocation hearing was held.

Plaintiff was then convicted of first degree manslaughter and given an indeterminate sentence of twenty years. The judge imposed this sentence concurrently with the 1961 sentences, and plaintiff was thus entitled to credit on the new sentence for all time served on the former ones. He was committed to a correctional facility on September 19, 1972, and on July 18, 1973, the Board held a hearing and set the plaintiff's minimum sentence at three years from the date of his reception at the correctional facility. At that time the Board apparently believed that the minimum sentence would expire in August, 1975 and that plaintiff would then be eligible for parole. However, counsel for the Department of Correctional Services advised the Board that under a proper interpretation of the statutes,[1/] plaintiff was eligible for parole immediately. Since all his sentences were concurrent,

he was entitled to ten years credit from the 1961 sentences which more than fulfilled his new three year minimum term from the 1972 conviction.

The Board first held a hearing in response to this information on January 29, 1975, at which time it postponed a decision until August 26, 1975, the date on which it had originally planned to have plaintiff first eligible for parole when it imposed the minimum sentence. Notice of the hearing was apparently the first time plaintiff became aware of his statutory right to an eligibility hearing, and he filed this action on January 11, 1975. The Board moved to dismiss under Federal Rule 12(b), but withdrew the motion, so that the August hearing could be held.

The record reflects that at the August hearing the Board discussed the 1972 conviction with the plaintiff, and then decided to deny parole and hold the plaintiff for two years more. The Board - at its August hearing - clearly exercised its powers in accordance with §213 of the Corrections Law (McKinney Supp. 1975)[2/] and §70.40 of the Penal Law. To grant parole, the Board must be satisfied that the prisoner will not violate the law or endanger society. The Board's reasons in this instance[3/] relate directly to that standard, and the denial of parole was within the very broad discretion granted the Board by statute. See, e.g., the Second Circuit's discussion of the

Board's powers in U.S. ex rel Johnson v. Chairman, N.Y. State Board of Parole (1974) 500 F.2d 925, 929.

However, even though the denial of parole was well within the Board's power, we must reach the further question of whether the Board violated any of plaintiff's constitutional rights by not holding the hearing at the statutorily mandated time.

The actions of the Board in setting the minimum sentence on the 1972 conviction at three years and then disregarding the requirements of §§70.30 and 70.40 of the Penal Law until advised of their impact by counsel for the Department of Correctional Services make it reasonably obvious to us that the Board was acting under a misconception about when plaintiff was eligible for parole. As plaintiff contends, this mistake by the Board deprived him of the opportunity to argue for parole as soon as he might have wished. But two years later the Board was not willing to grant parole with the identical facts before it. The minutes of both the January and August hearings indicate that neither denial was frivolous, but rather directed at plaintiff's apparent breach of his earlier parole and his extended prior criminal record.[4/]

While we are sympathetic to plaintiff's frustration because

the Board failed to comply with the letter of the law it is charged with administering, we do not think that these shortcomings, though regrettable, amount to a deprivation of constitutional rights. Without some evidence that the Board's denial of parole in August was either in retaliation for plaintiff's bringing this suit or designed strictly to moot the issues raised, we find that the Board has acted within its discretion. Accordingly, the Board's motion to dismiss is granted.

SO ORDERED.

Dated: New York, New York
April 19, 1976.

WHITMAN KNAPP, U.S.D.J.

FOOTNOTES

1/

§70.30 Calculation of terms of imprisonment

1. Indeterminate sentences. An indeterminate sentence of imprisonment commences when the prisoner is received in an institution under the jurisdiction of the state department of correction. Where a person is under more than one indeterminate sentence, the sentences shall be calculated as follows:

(a) If the sentences run concurrently, the time served under imprisonment on any of the sentences shall be credited against the minimum periods of all the concurrent sentences, and the maximum terms merge in and are satisfied by discharge of the term which has the longest unexpired time to run;

§70.40 Release on parole; conditional release

1. Indeterminate sentence.

(a) A person who is serving one or more than one indeterminate sentence of imprisonment may be paroled from the institution in which he is confined at any time after the expiration of the minimum period or periods of imprisonment that have been fixed. Release on parole shall be in the discretion of the state board of parole, and such person shall continue service of his sentence or sentences while on parole, in accordance with and subject to the provisions of the correction law.

2/

§213 Reasons for release

Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole if of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society. If the board of parole shall so determine, such prisoner shall be allowed to go upon parole outside of prison walls and enclosure upon such terms and conditions as the board shall prescribe and shall remain while thus on parole in the legal custody of the board of parole until the expiration of the maximum term or period of the sentence or return to an institution under the jurisdiction of the commissioner of correction. As amended L.1969, c. 270, eff. April 27, 1969.

3/

The Board's statement of reasons was as follows:

> Parole denied - held 2 years, reasons: past failures while under parole supervision, the extensive past criminal history. While under parole supervision committed a new crime of manslaughter 1st degree and it is felt that release at this time would not be in the best interest of society. (Defendant's Exhibit B)

4/

The Board indicated at the January hearing that it would be disposed to reconsider parole for plaintiff if his appeal of the manslaughter conviction is successful.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

T-6215

REGINALD ROBERTSON,

PLAINTIFF,

-v-

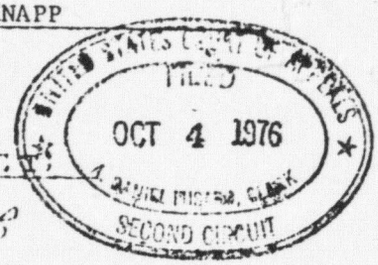
PAUL J. REGAN, CHAIRMAN, NEW YORK STATE BD. OF PAROLE,

DEFENDANT.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

CASE NO. 75 civ. 677

JUDGE KNAPP



DOCUMENTS

INDEX TO THE RECORD ON APPEAL

Certified copy of docket entries

Complaint.	1.
Order granting plaintiff permission to proceed in forma pauperis.	2.
Summons with Marshal's return.	3.
Order granting deft. time to answer complaint-Knapp J.	4.
Memorandum of Law in support of deft's motion to dismiss.	5.
Plaintiff's Reply Affidavit.	6.
Deft's Notice of Motion to dismiss complaint.	7.
Deft's Memorandum of Law in support of deft's motion.	8.
Plaintiff's Reply Affidavit in response to deft's motion to dismiss.	9.
Memorandum and Order #44282-Knapp J.	10.
Plaintiff's Notice of Appeal; memo. endorsed-Knapp J.	11.
Clerk's Certificate.	12.

76-2114

208-1	75	0677	02	11	75	3	550	1				0855		75	0677

PLAINTIFFS | DEFENDANTS | Knapp, J.

ROBERTSON, REGINALD

NEW YORK STATE BOARD OF PAROLE
REGAN, PAUL J. - Chairman

CAUSE

42 U.S.C. Sec. 1983 - prisioner civil rights action.

rg

ATTORNEYS

Reginald Robertson, Pro se
Drawer B
Stormville, N.Y. 12582

75-711

CHECK HERE IF CASE WAS FILED IN FORMA

FILING FEES PAID			STATISTICAL CARDS	
DATE	RECEIPT NUMBER	CD NUMBER	CARD	DATE MAILED
FEB 11 1975			JS5	
			JS6	2-27-75

DATE	NR.	PROCEEDINGS
02-11-75		Filed complaint andissued summons.
02-11-75		Filed ORDER that pltff. is permitted to proceed in forma pauperis without prepayment of fees, etc. Chief Judge Edelstein
02-11-75		Filed True copy of order dated 2-11-75. Re forma pauperis with summo & marshals return attached: Served. Paul Regan by V. Zuckerman,Atty. on 2-26-75.
04-03-75		Filed Order that deft's time to file his answer to complaint is ext. to 4-15-75. Knapp,J.
04-07-75		Filed deft's affidavit & notice of motion to dismiss complaint ret. 4-25-75
04-07-75		Filed deft's memorandum of law in support of motion ret.4-25-75..
04-16-75		Filed reply affidavit by pltff in opposition to the affirmation of t atty General of the State of New York
06-13-75		Filed Memo-endorsed on motion filed 4-7-75 to dismiss complaint: The motion to dismiss is withdrawn, without prejudice to renew So ordered. Knapp,J.
11-19-75		Filed deft's notice of motion to dismiss complaint ret.12-5-75.
11-19-75		Filed deft's memorandum of law in support of his motion ret.12-5-75.
11-26-75		Filed pltff's reply affidavit in response to deft's motion to dismis
04-22-76		Filed Memorandum & Order #44282: The Board's motion to dismiss is gr. So ordered. Knapp,J. --Judgment entered--Clerk-mailed notice
06-17-76		Filed pltff's notice of appeal to the U.S.C.A. from decision & order dismissing his complaint. m/n

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REGINALD ROBERTSON,

PLAINTIFF,

-v-

PAUL J. REGAN, CHAIRMAN, NEW YORK STATE BD OF PAROLE,

DEFENDANT.

CASE NO. 75 civ. 677

JUDGE KNAPP

CLERK'S CERTIFICATE.

I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified copy of docket entries lettered A- B, and the original filed papers numbered 1 thru 12, and exhibits ---------- ----------, inclusive, constitute the record on appeal in the above entitled proceeding; except for the following missing documents:

DATE FILED	PROCEEDINGS
4-7-76	Deft's Notice of motion to dism 4/15/ complaint.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 16th day of JULY, in the year of our Lord, One thousand nine hundred and seventy SIX, and of the Independence of the United States the 201st year.

Raymond F. Burghardt
Clerk of the Court

Copy received 9-11-78

Louis J. Lefkowitz
Attorney General
By /s/ Asst. Atty Gen